Tentative Rulings for December 11, 2013
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

13CECG03625 ***In The Matter of Kevin Evaro*** **(Dept. 402)**

12CECG01284 ***Kelts v. Perkins, Mann & Everett*** **(Dept. 503)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

13CECG02480 ***Bank of the Sierra v. Smith*** **is continued to Thursday, December 19, 2013 at 3:30 p.m. in Dept. 501.**

10CECG02349 ***Tehachapi Valley v. AspenStreet*** **is continued to Tuesday, January 14, 2013 at 3:30 p.m. in Dept. 503.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(20) **Tentative Ruling**

Re: ***Renzenberger, Inc. v. Nverovich, et al.***, Superior Court Case No. 12CECG02406

Cisneros v. Tadevosyan et al., Superior Court Case No. 12CECG03239

Mayle v. Tadevosyan, Superior Court Case No. 13CECG00761

Hearing Date: **December 11, 2013 (Dept. 402)**

Motion: Defendant Nverovich Tadevosyan's Motion to Amend Answer

Tentative Ruling:

To grant. The proposed amended answer shall be filed within 10 days of service by the clerk of the minute order.

Explanation:

"The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading ... " Code Civ. Proc. § 473(a)(1) (emphasis added). The court's discretion will usually be exercised liberally to permit amendment of the pleadings. See *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939; *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596; *Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428.

The moving papers largely comply with Cal. Rules of Court, Rule 3.1324, and no party has opposed the motion.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 12/10/2013.
(Judge's initials) (Date)

(2)

Tentative Ruling

Re: ***In re Rosario Espinoza***
Superior Court Case No. 13CECG03176

Hearing Date: December 11, 2013 (Dept. 402)

Motion: Petitions to Compromise a Minors' Claims

Tentative Ruling:

To grant. Orders signed. Hearings off calendar.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 12/10/2013.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Phillips v. Amcord, Inc.***
Superior Court Case No.: 12CECG04055

Hearing Date: December 11, 2013 (**Dept. 402**)

Motion: By Defendant Pneumo Abex LLC for summary judgment or, in the alternative, summary adjudication of the third cause of action for conspiracy and the claim for punitive damages

Tentative Ruling:

To treat the motion as to the third cause of action for conspiracy as a motion for judgment on the pleadings and to grant, without leave to amend, and to deny the remainder of the motion. Plaintiffs are directed to submit directly to this Court, within 5 days of service of the minute order, a proposed order denying the motion for summary judgment that complies with Code of Civil Procedure section 437c, subdivision (g).

Should oral argument be requested, it will be heard on Thursday, December 19, 2013, at 1:45 p.m. in Dept. 402; notice of intent to appear must still be timely under California Rules of Court, rule 3.1308.

Explanation:

Third Cause of Action For Conspiracy

A defendant's motion for summary judgment or summary adjudication "necessarily includes a test of the sufficiency of the complaint" and its legal effect is the same as a demurrer or motion for judgment on the pleadings. (*American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1118.)

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors." [Internal citations omitted.] (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.)

The Court notes that Plaintiffs have agreed to dismiss this cause of action as against Pneumo Abex LLC ("Abex"), and thus treats the motion as one for judgment on the pleadings and grants, without leave to amend.

Summary Judgment – Lack of Causation – No Evidence

Defendant Pneumo Abex LLC did not meet its burden to demonstrate by way of the introduction of evidence that Plaintiffs do not possess, and cannot reasonably obtain, needed evidence on the issue of causation. (Code Civ. Proc., §437c, subd. (p)(2).)

"Summary judgment law in this state … continues to require a defendant moving for summary judgment to present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. … The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence—as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Aguilar v. Atlantic Richfield Company* (2001) 25 Cal.4th 826, 854–855, fn. omitted.) The reason is that the statutory language requires that the motion be "supported" by evidence. (*Id.* at pp. 854-855.)

Under the standard enunciated in *Aguilar, supra,* 25 Cal.4th at pages 850–851, the defendant must make an affirmative showing that the plaintiff will be unable to prove its case by any means.

Punitive Damages Unsupported by Clear and Convincing Evidence

Plaintiffs have raised an issue of material fact concerning the request to summarily adjudicate the claim for punitive damages. (Code Civ. Proc., § 437c, subd. (p)(2).)

Plaintiffs have submitted evidence that Abex sold and distributed asbestos-containing automotive friction products including brakes from 1927-1987; in 1936, Abex participated in the financing of Dr. Gardner of the Saranac Laboratory and his proposed "experiments with asbestos dust for the purpose of determining more definitely the causes and effects of asbestosis"; in 1940, the Industrial Hygiene Foundation published an abstract to its members, including Abex, entitled "Asbestosis in Grinders and Drillers of Brake Bands"; in March 1944, Dr. Hamlin, Abex's medical director, published an article in Industrial Medicine entitled "Industrial Dust – The Pneumoconiosis" acknowledging that "[o]f the dusts studied up to the present time, only silica and asbestos produce definite pulmonary fibrosis" and Dr. Hamlin further acknowledged that asbestosis, as an occupational disease, is recognized in various industries, including "the compounding of materials for automobile brake linings"; in 1948, Abex received correspondence from the members who funded Dr. Gardner's "asbestos dust experiments" at the Saranac Laboratory and based on the "unanimous opinion" of the members (including Abex), "the reference to cancer and tumors should be deleted" from the report and all copies of the report returned because "it would be most unwise to have any copies of the draft report outstanding if the final report is to be different in any substantial respect"; on January 17, 1950, the president of Abex, William B. Given, gave a talk at a luncheon of the National Fund for Medication on the subject of "The Importance of Industrial Medicine" and Mr. Given acknowledged the poor working conditions in its plants and the fact that "interest was chiefly in terms of insurance costs, not in terms of human obligations"; in 1951, Dr. Hamlin, medical director

at Abex, published an article in the National Safety Council entitled: Industrial Hygiene, Industrial Dusts – What Every Supervisor Should Know and in that article, Dr. Hamlin acknowledged that: "At the present time, it is generally agreed that the most important sources of industrial disease of the lungs are free or un-combined silica and asbestos" and further stated that "The best treatment of any disease associated with industry is not to let it happen in the first place"; Despite this knowledge, Abex did not issue warnings about the hazards of asbestos until the mid-1970s.

Concerning the purported "lack" of evidence to summarily adjudicate this claim, Plaintiffs say their discovery responses pointed to Abex having the evidence: sales records, specifications and drawings for its asbestos-containing brakes, purchase orders, distribution records, and invoices, but Abex never produced them.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 12/10/2013.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Howells v. Tiscareno***
Superior Court Case No.: 08CECG00687

Hearing Date: December 11, 2013 (**Dept. 402**)

Motion: By Plaintiffs Craig Howells and Jennifer Howells for enforcement of settlement agreement and to enter judgment pursuant to stipulation for entry of judgment

Tentative Ruling:

To grant, in part, as modified, in the principal amount of $11,198.98.

Explanation:

The Court will grant the motion for entry of judgment in the principal amount of $11,198.98, but notes that the Settlement Agreement does not provide a mechanism whereby interest on the note can be calculated upon default and Plaintiffs Craig Howells and Jennifer Howells ("Plaintiffs") can "go back" and add that interest to the principal balance. In fact, the Settlement Agreement specifically provides in ¶6: "No interest shall accrue or be charged on this sum unless a default occurs as covered in paragraph 9 below." Paragraph 9 of the Settlement Agreement provides that Plaintiffs may apply for entry of judgment, and ¶12 provides for the rate of interest on entry of judgment.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 12/10/2013.
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Cordova v. California Transplant Donor Network***
Case No. 12CECG00076

Hearing Date: December 11th, 2013 (Dept. 402)

Motion: Defendant's Motion for Reconsideration, or in the Alternative, for Relief Pursuant to Code of Civil Procedure Section 473(b)

Plaintiff's Demurrer to Answer to First Amended Complaint

Tentative Ruling:

To grant the motion for reconsideration of the order compelling defendant to respond to requests for production of documents. (Code Civ. Proc. § 1008(a).) In the alternative, the court intends to grant relief under Code of Civil Procedure section 473(b). To reset the matter for a pretrial discovery conference, on a date to be agreed upon by the parties at the hearing. To deny plaintiffs' request for monetary sanctions against defendant and its counsel for failure to comply with the Fresno County Superior Court Local Rules.

To sustain the demurrer to the answer to the first amended complaint in part and overrule in part. (Code Civ. Pro. § 430.20(a).) The court intends to sustain the demurrer as to the third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh, twelfth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-seventh, twenty-eighth, thirtieth, thirty-third, thirty-sixth, and thirty-eighth affirmative defenses for failure to state facts sufficient to constitute a valid defense. The court intends to overrule the demurrer as to the other affirmative defenses. Also, the court intends to grant leave to amend the answer. Defendant shall serve and file its first amended answer within 10 days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

Motion for Reconsideration/Relief under Section 473(b): Defendant has moved for reconsideration of the order compelling defendant to provide responses to the documents requests, or in the alternative for relief under Code of Civil Procedure section 473(b). Under Code of Civil Procedure section 1008(a), "When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order." (Code Civ. Proc., § 1008(a).)

"To be entitled to reconsideration, a party should show that (1) evidence of new or different facts exist, and (2) the party has a satisfactory explanation for failing to produce such evidence at an earlier time. [Citation.]" (Kalivas v. Barry Controls Corp. (1996) 49 Cal.App.4th 1152, 1160-61.)

In *Kalivas*, the Court of Appeal found that plaintiff's counsel had met the requirements for reconsideration, where a confusing local rule misled counsel into failing to file a separate statement or opposition to a summary judgment motion, and failing to appear at the hearing on the motion. (*Id*. at 1161.) "This constitutes an adequate showing of new or different facts. The flawed courtroom local rule also provides a satisfactory explanation why Kalivas did not produce evidence at an earlier time." (*Ibid*.) The court also held that the local rule conflicted with the Code of Civil Procedure and Government Code, and was procedurally confusing, thus leading plaintiff's counsel to fail to oppose the motion. (*Id*. at 1158-1160.) Thus, the Court of Appeal found that the trial court had abused its discretion in refusing to grant reconsideration of the order granting the summary judgment motion and entering judgment against the plaintiff. (*Id*. at 1161.)

Likewise, the local rule here is ambiguous and confusing. Local Rule 2.1.17 states, in part,

> Any request for a Pretrial Discovery Conference must be filed with the Clerk's Office on the approved form (provided by the clerk), must include a brief summary of the dispute, and must be served on opposing counsel. **Any opposition to a request for a Pretrial Discovery Conference** must also be filed on an approved form (provided by the clerk), must include a brief summary of why the requested discovery should be denied, must be filed within five (5) court days of receipt of the request for a Pretrial Discovery Conference and must be served on opposing counsel." (Local Rule 2.1.17 A 1, emphasis added.)

Furthermore, the rule states, "**Refusal of any counsel to participate in a Pretrial Discovery Conference** shall be grounds, in the discretion of the Court, for entry of an order adverse to the party represented by counsel so refusing, or adverse to counsel." (Local Rule 2.1.17 C, emphasis added.)

Thus, the rule is ambiguous, since it could reasonably be read to mean that only if the opposing party opposes the pretrial discovery conference itself, as opposed to the merits of the underlying discovery dispute, is the party required to file opposition to the request for pretrial discovery conference. Defense counsel claims that she believed that the rule meant that she did not have to file an opposition to the pretrial discovery conference if she did not oppose the request for a conference, and that the court would set a conference or permit the filing of a motion to compel if she did not oppose the request. Her interpretation appears to be a reasonable reading of the rule, and thus the court intends to reconsider its order compelling defendant to respond to the document requests.

Indeed, the court's own banner on its website indicates that the court is aware that the rule is ambiguous and may cause reasonable confusion. The banner states,

> Although modifications to Local Rule 2.1.17 cannot go into effect until 1/1/14 the Court has discovered some **deficiencies with the rule** as drafted that must be addressed immediately. **These deficiencies are causing confusion to the parties**. The Court is providing this notice to explain the intent of the rule and clarify the language.
>
> Subsection A1 of the rule sets out the requirement for opposition to a request for a Pretrial Discovery Conference. Subsection C provides that the refusal to participate in a Pretrial Discovery Conference shall be grounds for entry of an order adverse to the party or counsel refusing to participate. **The Court hereby clarifies that opposition is necessary not only if you are opposing the request for a Pretrial Discovery Conference itself but also if you are opposing the merits underlying the request, i.e. the underlying discovery dispute**. This is why the opposition must include a brief summary of why the requested discovery should be denied. Along with a refusal to participate, a failure to file a written opposition to the merits underlying a request for a Conference is grounds for entry of an order adverse to the party or counsel failing to file opposition. To reiterate where there has been no written opposition to the merits of the request filed the court may, in its discretion, enter an order adverse to the non-responding party. (Banner on Court's website, http://www.fresno.courts.ca.gov/civil/, emphasis added.)

Thus, the court has admitted that the rule has some deficiencies as drafted, and is causing confusion to the parties. In fact, the court's banner specifically notes the same confusion that has been cited by defendant here, namely that the effect of a failure to file opposition to the pretrial discovery conference. Therefore, defense counsel's mistake in misreading the rule appears to have been reasonable in light of the ambiguous and confusing language of the rule.

The rule also appears to conflict with California Rules of Court, Rule 3.20. Rule 3.20 states,

> The Judicial Council has preempted all local rules relating to pleadings, demurrers, ex parte applications, motions, **discovery**, provisional remedies, and the form and format of papers. **No trial court, or any division or branch of a trial court, may enact or enforce any local rule concerning these fields. All local rules concerning these fields are null and void** unless otherwise permitted or required by a statute or a rule in the California Rules of Court. (Cal. Rules of Court, Rule 3.20, emphasis added.)

Here, Local Rule 2.1.17 attempts to impose additional procedural requirements on parties with regard to discovery motions, and the rule also allows the court to impose orders granting affirmative relief if the opposing party fails to file opposition to the request for pretrial discovery conference. Since the Judicial Council has expressly preempted all local rules regarding discovery, the rule appears to be in conflict with the Rules of Court, and thus it is void.

The local rule also conflicts with the detailed procedures set forth in the Discovery Act, and in particular Code of Civil Procedure sections 2031.300 and 2031.310, as well as California Rules of Court, Rule 3.1110 and 3.1345. The local rule permits the court to effectively grant a motion to compel further responses without a motion to compel or separate statement being filed or served, or any declarations regarding meet and confer efforts being submitted. No hearing is required under the local rule, and the other side has no opportunity to appear and argue against the merits of the motion.

In addition, to the extent that the court has published the banner on its website to clarify the intent and effect of the local rule, the banner is not itself a properly promulgated local rule and cannot have any binding effect on the parties. Code of Civil Procedure section 575.1 and Government Code sections 68070 and 68071 set forth the requirements for adopting local rules. However, those requirements have not been followed with regard to the banner. Indeed, the banner itself notes that the local rule has not yet been officially amended, and that the court is merely clarifying the purpose and effect of the rule. Thus, the banner does not constitute a binding local rule, and the court cannot punish a party for failing to follow its guidelines.

Also, the court should note that it is possible for a party to consult the local rules on the court's website without ever seeing the banner. The banner is located on the court's "civil" web page, which is separate from the "local rules" portion of the website. If a party goes from the home page of the court's web site to the "local rules" page, the party would never even see the banner on the separate civil page. This is allegedly what happened to defense counsel, who claims that she never saw the banner until after the court issued its order. Therefore, it appears that counsel's mistake in failing to see the banner was reasonable under the circumstances, and the court intends to reconsider its order compelling defendant to respond to the discovery requests.

In the alternative, the court intends to grant the alternative motion for relief under Code of Civil Procedure section 473(b). Under section 473(b),

> The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. (Code Civ. Proc., § 473(b).)

As discussed above, it appears that counsel's mistake or neglect in misreading the local rule and failing to see the court's explanatory banner was reasonable under the circumstances. The rule itself is somewhat ambiguous, and the banner explaining the rule is not located in a place where counsel would necessarily see it when researching the local rules. Therefore, the court intends to find that counsel's mistake or neglect was reasonable under the circumstances, and it should grant relief from the order under section 473(b).

Plaintiffs have argued that defense counsel's mistake was not reasonable, since she has an obligation to be familiar with the local rules. Indeed, plaintiffs note that defense counsel has participated in another pretrial discovery conference in this case before, so she cannot claim to be unaware of the procedures for such conferences. However, the defendant was previously the party that requested the pretrial discovery conference, so counsel would not necessarily have known about the effects of a failure to file opposition to the request for a conference. Also, the local rule is inherently ambiguous and confusing, and the explanatory banner is located in a different part of the court's website, so counsel's misreading of the rule is not unreasonable under the circumstances. Therefore, the court intends to grant the motion to set aside the order compelling defendant to respond to the document requests, and set the matter for a discovery conference.

Finally, the court intends to deny plaintiffs' request for monetary sanctions against defendant. Plaintiffs move for sanctions under Code of Civil Procedure section 575.2, which authorizes the court to order parties or their counsel to pay the reasonable expenses for making a motion regarding a local rule violation, including reasonable attorney's fees. Here, however, the local rule in question is inherently ambiguous and confusing, so the violation was excusable. Under the circumstances, the court will not impose sanctions against defendant or its counsel.

Demurrer to Answer: Plaintiffs demur to each affirmative defense on the grounds of failure to state facts sufficient to constitute an affirmative defense and uncertainty. (Code Civ. Proc. § 430.20(a), (b).) The affirmative defenses do not appear to be uncertain, as they clearly and concisely set forth the defenses that defendant intends to raise. However, many of the affirmative defenses fail to state any facts to support the elements of the asserted defense.

For example, the third affirmative defense asserts the defense of "after-acquired evidence", which defendant claims limits or reduces plaintiffs' alleged damages. However, defendant alleges no facts to show that the doctrine of after-acquired evidence would apply to plaintiffs' claims or reduce their damages. Therefore, the third affirmative defense fails to state facts sufficient to constitute a valid defense.

The fourth, fifth, sixth, seventh, eighth, ninth, eleventh, twelfth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-seventh, twenty-eighth, thirtieth, thirty-third, thirty-sixth, and thirty-eighth affirmative defenses also fail to state any facts to support the asserted defenses, and are therefore insufficiently pled. The court intends to sustain the demurrer as to those defenses, with leave to amend.

On the other hand, the remaining defenses are sufficiently pled. Some of them do not require any factual pleading, since they assert legal theories that do not require factual support. For example, the first affirmative defense asserts that plaintiffs' complaint and each cause of action in it fails to allege facts sufficient to constitute a cause of action. There is no need to allege further facts to support this theory, as any such facts would amount to arguing a demurrer to the entire complaint.

Other affirmative defenses allege at least some ultimate facts to support them. For example, the twenty-first and twenty-second affirmative defenses allege that defendant implemented and enforced good faith anti-discrimination and retaliation policies. Thus, defendant has adequately alleged these defenses. Therefore, the court intends to overrule the demurrer as to the first, second, tenth, thirteenth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, thirty-first, thirty-second, thirty-fourth, thirty-fifth, thirty-seventh, and thirty-ninth affirmative defenses.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 12/10/2013.
(Judge's initials) (Date)

Tentative Ruling

(24)

Re: ***Nolte v. Nolte***
Court Case No. 13CECG01756

Hearing Date: **December 11, 2013 (Dept. 402)**

Motion: 1) Demurrer of Cross- Defendants' Edmund Nolte and Cindy Nolte to First Amended Cross-Complaint
2) Motion of Cross- Defendants' Edmund Nolte and Cindy Nolte to Strike Portions of the First Amended Cross-Complaint

Tentative Ruling:

To grant the motion to strike as to Paragraph 22 and the prayer for attorneys' fees and costs at Page 6, line 9 and the phrase "For costs of suit herein incurred including attorneys' fees and costs" at line 11, *without* leave to amend. To deny the motion to strike as to punitive damages at Paragraph 23 and the prayer at page 6, line 8.

To overrule the demurrer to the First cause of action. To sustain the demurer to the Third cause of action, based on uncertainty (Code Civ. Proc. § 430.10, subd. (f)), *with* leave to amend. Plaintiff is granted 10 days' leave to file the Second Amended Cross-Complaint. The time in which the complaint can be amended will run from service by the clerk of the minute order. New allegations/language in the first amended complaint are to be set in **boldface** type.

Explanation:

Demurrer to First Cause of Action:

This is a statutory claim under California's Violation of Privacy Act, based on Penal Code Section 632, which provides at subsection (a) as follows:

> (a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. (Pen. Code § 632, subd. (a).)

Subsection (c) further provides the following definition as to the term "confidential communication":

> (c) The term "confidential communication" includes **any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto,** but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded. (Pen. Code § 632, subd. (c), emphasis added.)

The key is not whether the content of the communication itself is confidential. Rather, confidentiality refers to the "objectively reasonable expectation" that the <u>conversation is private, and is not being overheard or recorded.</u> (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 776-777—upholding "objectively reasonable" standard. See also *Kight v. CashCall, Inc.* (2011) 200 Cal.App.4th 1377.) In both *Flanagan* and *Kight*, the courts discussed the divergent tests that had developed as to determining the definition of "confidential communication. One of those tests required plaintiff to prove that he had an objectively reasonable expectation that *no one would divulge the content of the conversation to a third party*. The California Supreme Court in *Flanagan* disapproved that test, and affirmed that plaintiff (or cross-complainant) merely had to prove that he had an objectively reasonable expectation that the conversation was not being recorded or listened to by others.

It must be noted that the cases relied on by Cross-Defendants (*Flanagan* and *Kight*, *supra*) were not pleading cases (testing the sufficiency of the allegations), but were considering the sufficiency of the <u>evidence</u>. (See *Flanagan v. Flanagan* (2002) 27 Cal.4th 766—California Supreme Court reversed judgment; and *Kight v. CashCall, Inc.* (2011) 200 Cal.App.4th 1377—appeal after ruling on summary judgment.) Thus, while the points taken from these cases are accurate as to what Cross-Complainants will need to <u>prove</u>, they are not necessarily determinative of what they need to *plead* to sufficiently state their claim under California's Invasion of Privacy Act.

Cross-Defendants correctly point out that a demurrer "does not admit contentions, deductions or conclusions of fact or law alleged therein." (*Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1152.) However, it is also true that on demurrer the pleading "must be construed liberally by drawing *reasonable inferences from the facts pleaded*." (Rodas v. Spiegel (2001) 87 Cal.App.4th 513, 517 (emphasis added).) Thus, the pertinent question is what reasonable inferences can be drawn from the facts pleaded.

One case that discusses pleading standards as to this statute (and the only case referenced in the Annotated Penal Code § 632 under the subject of "pleadings") is that of *Faulkner v. ADT Sec. Services, Inc.* (9th Cir. 2013) 706 F.3d 1017 ("*Faulkner*"). Even though this is Federal court appellate opinion, and thus is not authoritative on this court, it is nonetheless persuasive, especially given the apparent dearth of California state cases regarding the pleading standards for this statute.

In *Faulkner*, the court found that plaintiff had failed to "allege facts that would lead to the plausible inference that his was a confidential communication—that is, a communication that he had an objectively reasonable expectation was not being recorded." (*Id.* at p. 1020.) Specifically, the two allegations plaintiff made regarding the confidentiality of his communications with defendant were: 1) that he had called defendant ADT to "dispute a charge," and 2) that his conversation was confidential because it was "carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined thereto." (*Id.*)

The court found that the latter allegation was "no more than a threadbare recital" of the language of the statute, and that such "bald legal conclusions are not entitled to be accepted as true," *especially* where the first allegation (that he had called to dispute a charge) was insufficient to create a "plausible inference that he had an objectively reasonable expectation of confidentiality." Given the threadbare allegations (i.e., that a customer called a home security company), the court said, "Too little is asserted in the complaint **about the particular relationship between the parties, and the particular circumstances of the call**, to lead to the plausible conclusion that an objectively reasonable expectation of confidentiality would have attended such a communication." (*Id.* at is p. 1020.)

Even though the court found that more was needed about the "particularities" in that case to properly allege this claim, it does not appear that it intended to require a heightened pleading standard for this statute. It is just that the two facts alleged failed to "nudge his claim from conceivable to plausible" (*Faulkner*, *supra 706 F.3d* at 1020, internal quotation marks, brackets, and citations omitted.) Clearly, this is not requiring a heightened pleading standard, but is just indicating the bare minimum that will suffice.

The question, then, is whether in the case at bench the allegations of the FACC "nudge" the claim "from conceivable to plausible" as to the Cross-Complainants' objectively reasonable expectation that their conversation was not being heard or recorded. On balance, it does enough to accomplish the requisite "nudge" to at least meet the bare minimum standard the court was looking for in *Faulkner*.

Here, the pertinent allegations are:

- That Cross-Complainants and Cross-defendant "Butch" Nolte were involved in various capacities in conducting the business of Nolte Sheet Metal, a closely-held family-run business (see ¶¶ 9 and 10).
- That in the spring of 2013, certain children of Cross-Defendants Butch and Cindy Nolte, who were also former employees of Nolte Sheet Metal, filed a lawsuit against the company, alleging unpaid wages (also ¶10).
- That during the spring of 2013, Cross-Complainants met with Cross-Defendants Butch and Cindy Nolte "to resolve certain disputes that arose between Ernie Nolte and Butch Nolte," and that during this meeting they discussed "confidential and personal matters," and that they did so "both individually and on behalf of the corporation" (see ¶¶ 11 and 12).

- That unbeknownst to Cross-Complainants, and without their consent, Butch and Cindy Nolte secretly recorded these conversations (¶13).
- That these secretly-recorded discussions were later shared with Cross-Defendants Jeff Nolte and Shelly Bryant, who had knowledge that these recordings were not authorized, and that the content of those recordings were later used by Mr. Bryant to "leverage a settlement" (¶¶14-16).

Cross-Defendants argue in Reply that the facts alleged do not reflect "the existence of a discussion that was confidential and personal." However, that is not the case, since Cross-Complainants have expressly alleged that they discussed "confidential and personal matters." While it does not say *what* matters those were (i.e., the exact subject matter), it certainly alleges that the *nature* of the discussion was "confidential and personal." While this admittedly asserts *little* as to the "particular circumstances" of the meeting (i.e., little-to-no detail), there is enough stated for us to know that it concerned "conflicts" between the two brothers, and that this involved both *individual* and *corporate* concerns. Arguably, the Cross-defendants themselves have supplied more detail, inasmuch as ¶15 of the Complaint (which the court will judicially notice) alleges the substance of the subject matter of Ernie's alleged admissions at these meetings. The mere fact that the content of the discussion allegedly covered corporate matters, including the use (and alleged mis-use) of corporate funds is sufficient. (See, *e.g., Frio v. Superior Court* (1988) 203 Cal.App.3d 1480, 1489-90—telephone calls relating to a profitable venture, including discussions of market data and business strategy was sufficient to show reasonable expectation that no one was overhearing the conversation; see also *Bales v. Sierra Trading Post, Inc.* (S.D. Cal., Dec. 3, 2013, 13CV1894 JM KSC) 2013 WL 6244529—Plaintiff's allegation that he provided personal financial information, including credit card information, "is sufficient to establish a confidential communication for purposes of § 6s32.")

The allegations are sufficient at the pleading stage to "nudge" the claim of the expectation of confidentiality "from conceivable to plausible."

Demurrer to Third Cause of Action (Tort-Invasion of Privacy):

Cross-Defendants argue that this cause of action is uncertain because California law requires Cross-Complainants to set forth the essential facts of a cause of action "with reasonable precision and with sufficient particularity to acquaint the defendant with the nature, source and extent of his cause of action." (*Rannard v. Lockheed Aircraft Corp.* (1945) 26 Cal.2d 149, 156-157.) A demurrer for uncertainty will be sustained where defendant cannot reasonably determine the issues or what causes of action are directed against a specific defendant. (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616.)

There are different types of invasion of privacy torts. Such claims may be based on the California Constitution. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 32.) There are also common law tort claims based on privacy rights: 1) intrusion into private matters; 2) public disclosure of public facts; 3) publicity placing a person in a false light; and 4) misappropriation of a person's name and likeness. (*Id.* at 24.) Each of

these torts requires separate and distinct elements. And yet, the Third cause of action is merely labeled "Tort-Invasion of Privacy."

The line between the various "privacy torts" can become blurred, and often the same set of facts can give rise to several separate "privacy" causes of action. Cross-Complainants' arguments opposing the demurrer amount to saying that their claim adequately states a claim for violation of the California Constitution's guaranteed right to privacy. However, they do not argue that this *is* the claim that they are limiting themselves to. Cross-Defendants have demurred specially in order to remove the specter of a "moving target" as the litigation proceeds. Cross-Complainants can clearly state a valid claim based on invasion of privacy, and have shown as much in their opposition brief. However, Cross-Defendants are entitled to know which specific tort is being alleged.

Motion to Strike:

Cross-Defendants' failure to follow the requirements of California Rules of Court Rule 3.1322(a) is not a sufficient basis to deny the motion where Cross-Complainants were not prejudiced, but were able to address the motion fully on its merits.

As for the request to strike the language concerning attorneys' fees/costs (Paragraph 22, and prayer at page 6:9), Cross-Complainants fail to establish a basis for entitlement to these. Attorneys' fees/costs are only proper where provided for by statute or agreement of the parties. (Code Civ. Proc. § 1021; *Barthels v. Santa Barbara Title Co.* (1994) 28 Cal.App.4th 674, 680.) Here, the Cross-Complainants concede there is no agreement authorizing fees/costs. Nor does Penal Code Section 637.2 provide for these. Cross-Complainants cite to cases setting forth the standard for analyzing a cause of action *on demurrer* (*not* a motion to strike), which state the familiar concept that an improper prayer will not subject the complaint *to demurrer*, but rather the prayer should be disregarded when doing this analysis. (See *Merlino v. West Coast Macaroni Mfg. Co.* (1949) 90 Cal.App.2d 106, 112; *Lubin v. Lubin* (1956) 144 Cal.App.2d 781, 793; *Weber v. Superior Court of Yolo County* (1945) 26 Cal.2d 144, 148.) *However, this has nothing to do with the analysis on a motion to strike.* There being no basis for entitlement to attorneys' fees/costs, the motion to strike the above-mentioned portions of the FACC must be granted. The court includes in its order the phrase "For costs of suit herein incurred including attorneys' fees and costs" at page 6, line 11, on its own motion.

However, as to the request to strike language concerning the request for punitive damages, Cross-Complainants' analysis of the principle enunciated in *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890, 912 is correct. That case stated only that where a statute creates new right and obligations, the express statutory remedy is the exclusive remedy. California clearly recognizes a common law right of privacy. (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 227.) In such cases, a plaintiff or cross-complainant may plead a claim for both punitive and statutory civil remedies, even though in the end the plaintiff/cross-complainant must *elect* which of these to accept, since double-recovery will not be allowed. (See *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890,

907—"[A]lthough an award of both statutory penalties and punitive damages may be a prohibited double recovery if based on the same conduct, it is not improper to proceed on both theories of recovery and then make an election of remedies either at trial or after trial.")

The case of *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253 is instructive, since it was a claim where plaintiff raised both a statutory claim for unlawful wiretapping and a common law claim for invasion of privacy, and was considering the specific statute under consideration here, Penal Code Section 637.2, and moreover was reviewing the trial court's ruling on a motion to strike. It clearly found that where plaintiffs had stated both a statutory and a common law claim, it was proper to allow plaintiffs to pray for both statutory and punitive damages. Further, it affirmed that in the event plaintiffs recovered on both theories, they would have to make an election as to which award they wanted. (*Id.* at 1256.)

However, what the court expressly did not address in that case was "the hypothetical issue of whether punitive damages would be recoverable in the event that plaintiffs recover on their statutory claims *but not on their common law invasion of privacy theory*." (*Id.*, emphasis added.)

In other words, even though this case clearly stands for the proposition that the prayer for punitive damages is proper in this case, since both statutory and common law claims are pleaded, this case does *not* resolve the issue of whether it is proper to allow Cross-Complainants to keep Paragraph 23 as a part of their First Cause of Action (their statutory claim), or whether the statutory remedy for treble damages (at Subdivision (a)(2) of Section 637.2) is tantamount to punitive damages and thus precludes punitive damages *on that particular cause of action*. The fact that the court referred to this as a "hypothetical issue" and pointedly refused to address it may indicate that this issue has not been resolved by the higher courts.

On balance, neither side has adequately addressed this issue. Clearly, the motion to strike must be denied as to the general prayer for punitive damages, as noted above. The court will also allow Cross-Complainants to "proceed past the pleading stage with their punitive damage allegations," as the plaintiffs in *Clauson v. Superior Court* were allowed to do (*Id.* at p. 1255), and allow Paragraph 23 to remain a part of the Cross-Complaint. This does not preclude the issue of whether this is properly a part of this statutory claim from being addressed at a later stage in the litigation.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 12/10/2013.
(Judge's initials) (Date)

Tentative Rulings for Department 403

(6)

Tentative Ruling

Re: ***AGI Publishing, Inc. v. Stein***
Superior Court Case No.: 12CECG01161

Hearing Date: December 11, 2013 (**Dept. 403**)

Motions: (1) By Defendant HR Staffing, Inc., to continue trial;

(2) By Defendant HR Staffing, Inc., for stay; and

(3) By Plaintiffs Winton-Ireland Insurance Agency, Inc., and AGI Publishing, Inc., for leave to file first amended complaint

Tentative Ruling:

To grant the motion for leave to amend, and to take the motion for stay off calendar because no moving papers were filed. The first amended complaint shall be served and filed no later than December 18, 2013. All new allegations in the first amended complaint are to be set in **boldface** type. There is no tentative ruling on the motion to continue trial and the parties should appear at the hearing.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 12/9/2013.
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Sterling Pacific Lending, Inc. v. Jaramishian***
Superior Court Case No. 12CECG02721

Hearing Date: December 11, 2013 **(Dept. 403)**

Motions: By Plaintiff for summary judgment on the Complaint and by Cross-Defendant for summary judgment on the Cross-Complaint

Tentative Ruling:

To deny the motion brought by the Plaintiff as to the Complaint. The moving party has not met its burden pursuant to CCP § 437c (p)(1). A triable issue of material fact exists as to whether the Guaranty is a "sham". See Declaration of Fischer at ¶ 4 and Exhibit D attached thereto. As a result, it is not necessary to examine the opposition or the reply. It is not necessary to rule upon evidentiary objections.

The Court will not rule on the request for summary judgment on the Cross-Complaint. This should have been filed as a separate motion and a separate filing fee should have been paid. See CCP § 437c.

Explanation:

Procedural Defect

Plaintiff moves for summary judgment "on the ground that there is no triable issue of act that Defendant Jaramishian breached his contract to Plaintiff Sterling Pacific Lending, Inc. Additionally, there is no triable issue of fact as to the affirmative relief requested by Cross-Complainant Jaramishian against Cross-Defendant Sterling Pacific Lending, Inc., as to the causes of action raised in his Cross-Complaint." See Notice of Motion at page 2 lines 6-11.

There should have been two motions filed. One for the main action and one for the cross action. This is due to the fact that the burdens differ between the plaintiff (cross-complainant) and the defendant (cross-defendant. See CCP § 437c (p):

For purposes of motions for summary judgment and summary adjudication:

> (1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant or cross-defendant may not rely upon the mere allegations or denials of its pleadings to show that a

> triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.
>
> (2) A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.

In addition, the moving party did not pay a separate filing fee of $500 for the motion addressed to the cross-action. Therefore, the Court will not rule upon the portion of the motion that addresses the Cross-Complaint.

Plaintiff's Action on the Guaranty

Guaranty in General

A guarantor or surety (there is no legal distinction between the two in California) is one who promises to answer for the obligation or default of another or who pledges property as security for such obligation. A "letter of credit," however, is *not* a form of suretyship obligation. [See Civil Code § 2787; *American Contractors Indem. Co. v. Saladino* (2004) 115 Cal.App.4th 1262, 1268; *R.P. Richards, Inc. v. Chartered Const. Corp.* (2000) 83 Cal.App.4th 146, 154] A guaranty is unconditional unless its terms include a condition precedent. [Civil Code § 2806]

A guaranty of collectibility guarantees that an obligation is good or collectible—i.e., that the debtor is solvent and that the demand is collectible by an ordinary lawsuit prosecuted with reasonable diligence. [Civil Code § 2800] Before enforcing a guaranty of collectibility, a creditor generally must use due diligence to collect the obligation from the principal debtor and give notice of the debtor's default to the guarantor. [See *Citizens Nat'l Trust & Sav. Bank of Los Angeles v. Seaboard Sur. Corp. of America* (1935) 4 Cal.App.2d 766, 769, 41 P2d 956, 958] However, failure to proceed against the principal debtor does not discharge a guarantor of collectibility if (a) no part of the debt would have been collected by diligently prosecuting proceedings against the debtor; or (b) the debtor moved from California and left no property in California to satisfy the obligation. [See Civil Code §§ 2801, 2802]

A guaranty must be in writing and signed by the guarantor unless it is deemed to be an original obligation of the guarantor in accordance with one of the exceptions listed in Civil Code § 2794. [Civil Code § 2793]

A guaranty must be supported by independent consideration (i.e., consideration distinct from the underlying obligation) *unless*:

• The guaranty is executed at the same time as the underlying obligation; or

• The creditor accepts the underlying obligation when the guaranty is entered into; *and*

• The guaranty forms part of the consideration to the creditor. [Civil Code § 2792]

A guaranty is presumed to be supported by valid consideration—i.e., the party seeking to invalidate the guaranty bears the burden of proving lack of consideration. [Civil Code § 1615]

A guaranty may be treated as a "**sham**" where it is an attempt to avoid the **nonwaivable** protection of the antideficiency statutes (CCP § 580d). This may occur when debtors personally guarantee their own obligations or obligations of controlled entities. In such cases, the guaranty adds nothing to the transaction; i.e., the guarantor and obligor are treated as the same person. [*River Bank America v. Diller* (1995) 38 Cal.App.4th 1400, 1420; *Valinda Builders, Inc. v. Bissner* (1964) 230 Cal.App.2d 106, 112; *Jack Erickson & Assocs. v. Hesselgesser* (1996) 50 Cal.App.4th 182, 187–188]

In the case of *River Bank America v. Diller*, supra, a bank sought to enforce guaranties that secured a portion of the bank's nonrecourse construction loans to limited partnership. The trial court granted summary judgment for the guarantors but granted the bank's motion for summary adjudication on defendants' claim of negligent misrepresentation. Both parties appealed. In a postjudgment order, defendants' motion for award of attorney fees was granted and the bank appealed.

The First District Court of Appeal held that: (1) guarantors waived any defense based on statute requiring surety's obligation to be commensurate with principal obligation when guarantors signed guaranties; (2) triable issues of material fact as to whether bank looked to guarantors as primary obligors, and structured loan to avoid protections of antideficiency legislation precluded summary judgment for bank; (3) bank was not equitably estopped from enforcing guaranties; (4) guarantors did not have claim against bank for negligent misrepresentation; and (5) guarantors were not entitled to attorney fees.

Regarding the issue of whether the guarantors were, in reality, primary obligors, the court stated:

It is a factual question whether a person is a true guarantor or a principal obligor in guarantor's guise. (*Younker v. Reseda Manor* (1967) 255 Cal.App.2d 431, 438, 63 Cal.Rptr. 197.) In this regard, the court in *Torrey Pines Bank v. Hoffman* (1991) 231 Cal.App.3d 308, 320, 282 Cal.Rptr. 354, stated: "The correct inquiry set out by the authority is whether the purported debtor is anything other than an *instrumentality* used by the individuals who guaranteed the debtor's obligation, and whether such instrumentality actually removed the individuals from their status and obligations as debtors. (*Valinda, supra,* at p. 110, 40 Cal.Rptr. 735.) Put another way, are the supposed

guarantors nothing more than the principal obligors under another name? (*Dorn, supra,* at p. 159, 61 Cal.Rptr. 893.) As stated in *Union Bank v. Brummell, supra,* 269 Cal.App.2d 836, 838, 75 Cal.Rptr. 234, *the legislative purpose of the antideficiency law may not be subverted by attempting to separate the primary obligor's interests by making a related entity the debtor while relegating the true principal obligors to the position of guarantors.* (Citation and fn. omitted). To determine whether the [purported guarantors] as individuals were primary obligors ... such that their guarantees must be considered ineffective, we apply the approach of *Commonwealth Mortgage Assurance Co. v. Superior Court, supra,* 211 Cal.App.3d 508, 515, 259 Cal.Rptr. 425, *and look to the purpose and effect of the agreements to determine whether they are attempts to recover deficiencies in violation of section 580d."* (Italics added.)

Id. at 1422-1423.

In the motion at bar, the Guaranty is attached as Exhibit D to the Declaration of Fischer. It names Jaramishian as the **Borrower**. See Section A. There is no mention of Strategic Business Marketing Group, LLC whatsoever in the Guaranty. In addition, Fischer states that Strategic Marketing applied for a residential loan. He also states that the LLC had only 2 "managing" members; Jaramishian and Mark Layne. See Declaration of Fischer at ¶ 4. Yet, as a matter of law, guarantors who are general partners of a primary obligor partnership are themselves principal obligors. [*Union Bank v. Dorn* (1967) 254 Cal.App.2d 157, 158–159; *Westinghouse Credit Corp. v. Barton* (CD CA 1992) 789 F.Supp. 1043, 1045]

It has long been recognized that a moving party's own evidence may furnish inferences that create a triable issue of material fact. See *Maxwell v. Colburn* (1980) 105 Cal.App.3d 180 at 185. See also *Sesma v. Cueto* (1982) 129 Cal.App.3d 108 at 114. Here, the Guaranty and the Declaration of Fischer raise a triable issue of material fact as to whether the Guaranty was a "sham"; i.e., that Jaramishian was, in reality, the principal obligor and guaranteed his own debt. This would render the Guaranty meaningless. See *River Bank America v. Diller* (1995) 38 Cal.App.4th 1400, 1420; *Valinda Builders, Inc. v. Bissner* (1964) 230 Cal.App.2d 106, 112; *Jack Erickson & Assocs. v. Hesselgesser* (1996) 50 Cal.App.4th 182, 187–188. Most importantly, a supposed guaranty by the principal obligor is *ineffective* to circumvent the obligor's statutory antideficiency protection. [*River Bank America v. Diller*, supra, 38 Cal.App.4th at 1420; *Cadle Co. II v. Harvey* (2000) 83 Cal.App.4th 927 at 933.

"There is no obligation on the opposing party ... to establish anything by affidavit unless and until the moving party has by affidavit stated facts establishing *every element* ... necessary to sustain a judgment in his favor." See *Consumer Cause, Inc. v. SmileCare* (2001) 91 CA4th 454, 468. Given that the moving party has not met its burden, it is not necessary to examine the opposition or the reply. It is not necessary to rule upon evidentiary objections. The motion for summary judgment will be denied. The moving party has not met its burden pursuant to CCP § 437c (p)(1).

As noted by the Fifth District Court of Appeal: "Section 437c is a complicated statute. There is little flexibility in the procedural imperatives of the section, and the issues raised by a motion for summary judgment (or summary adjudication) are pure

questions of law. As a result, section 437c is unforgiving; a failure to comply with any one of its myriad requirements is likely to be fatal to the offending party." See *Brantley v. Pisaro* (1996) 42 CA4th 1591, 1607.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 12/10/2013.
(Judge's initials) (Date)

Tentative Rulings for Department 503

03

Tentative Ruling

Re: ***Mejorado v The Garold C. Brown Family Limited Partnership***
Case No. 13CECG01734

Hearing Date: December 11th, 2013 (Dept. 503)

Motion: Defendant's Petition to Compel Arbitration

Tentative Ruling:

To grant the petition to compel arbitration. (Code Civ. Proc. § 1281.2.) To stay the civil action until the arbitration has been resolved. (*Ibid*.)

Explanation:

Under Code of Civil Procedure section 1281.2,

> On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:
>
> (a) The right to compel arbitration has been waived by the petitioner; or
>
> (b) Grounds exist for the revocation of the agreement.
>
> (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. (Code Civ. Proc., § 1281.2.)

There is a strong public policy in favor of arbitration, and all doubts as to whether a dispute is covered by an arbitration agreement must be resolved in favor of arbitration. (*Bono v. David* (2007) 147 Cal.App.4th 1055, 1062.)

"It seems clear that the burden must fall upon the party opposing arbitration to demonstrate that an arbitration clause cannot be interpreted to require arbitration of the dispute." (*Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 686–687.)

In order to meet its burden of showing the existence of an agreement to arbitrate, the moving party must only submit a copy of the agreement or set forth its

provisions in the petition. (*Condee v. Longwood Management Corp*. (2001) 88 Cal.App.4th 215, 219.)

Here, defendant has provided a copy of the alleged arbitration agreement as an attachment to the petition, and has provided declarations to verify the existence of the agreement. (Brown decl., ¶¶ 6-9, and Exhibits A and B to the Petition.) Thus, defendant has met its burden of showing that an agreement to arbitrate exists between the parties.

Plaintiff argues in opposition[1] that defendant has no standing to enforce the arbitration agreement because it was not a party to the agreement. Plaintiff points out that the agreement is between herself and "Gary Brown Properties", not the defendant, The Garold C. Brown Family Limited Partnership, and thus defendant does not have standing to compel arbitration under the agreement. However, defendant alleges under penalty of perjury that "Gary Brown Properties" is just an informal name for The Garold C. Brown Family Limited Partnership, and that the Partnership is the actual legal entity under which defendant does business. (Brown decl. on Reply, ¶¶ 3, 4.)

Plaintiff does not present any evidence to dispute this fact. Also, plaintiff's own DFEH complaint named both the Partnership and "Gary Brown Properties" as respondents. (Exhibit A to Reply.) Thus, it appears that "Gary Brown Properties" has been used as an informal name for the Partnership, which was the plaintiff's actual employer and the other party to the arbitration agreement. Consequently, defendant has standing to enforce the arbitration agreement, and the court intends to find that there was an arbitration agreement between the parties.

Next, plaintiff has argued that the defendant waived its right to compel arbitration by failing to conduct informal negotiations to resolve the dispute, as required under the agreement. Also, plaintiff argues that defendant's conduct during the litigation is inconsistent with asserting the right to arbitration, and therefore the court should find that defendant waived its right to compel arbitration. However, the court does not intend to find that there was a waiver of the right to compel arbitration here.

"State law, like the FAA, reflects a strong policy favoring arbitration agreements and requires close judicial scrutiny of waiver claims. Although a court may deny a petition to compel arbitration on the ground of waiver, waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*Saint Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195, internal citations omitted.)

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[1] Defendant has objected to plaintiff's opposition on the grounds that it was not timely served or filed, and thus the court should refuse to consider it. However, while the opposition was filed and served one day late under Code of Civil Procedure section 1005(a), defendant was still able to file a timely and substantive reply, so the court will not penalize plaintiff for the late opposition by refusing to consider it.

"Both state and federal law emphasize that no single test delineates the nature of the conduct that will constitute a waiver of arbitration. 'In the past, California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citations.] The decisions likewise hold that the "bad faith" or "wilful misconduct" of a party may constitute a waiver and thus justify a refusal to compel arbitration. [Citations.]'" (*Id*. at 1195-96, internal citations omitted.)

"In determining waiver, a court can consider '(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the opposing party.'" (*Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 992, internal citations omitted.)

Here, plaintiff points to the defendant's alleged refusal to engage in informal negotiations to resolve the dispute, which plaintiff contends is inconsistent with the express language of the arbitration clause. Also, plaintiff notes that defendant invited plaintiff to file the present complaint, served a general denial to the complaint that did not mention arbitration, served and responded to discovery without mentioning arbitration, paid jury fees, and agreed to a trial date without requesting arbitration. Defendant has also sought a pretrial discovery conference in anticipation of bringing a motion to compel discovery responses from plaintiff. Plaintiff also contends that defendant unreasonably delayed in seeking arbitration.

However, the case has only been on file since June of 2013, and defendant only filed its answer in July, about three months before bringing the present petition to compel arbitration. Thus, defendant has not engaged in an excessively long delay in seeking arbitration. There have been no substantive rulings on any dispositive motions during the time the case has been pending. While some discovery requests have been served and answered, simply engaging in basic discovery is not enough by itself to show a waiver of the right to arbitration. Nor has defendant actually brought a motion to compel discovery responses, much less obtained a court order compelling such responses.

In *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, the court held that serving discovery requests that would have been allowable under AAA rules and "mere participation in litigation" did not constitute a waiver of the right to arbitrate, even though the opposing party incurred some costs and legal expenses during the litigation. (*Id*. at 1479.) The court noted that the case had only been pending for about two months before the petition to compel arbitration was filed, and no substantive

discovery responses had been served or formal hearings taken place on discovery issues. (*Ibid*.) Under these circumstances, the court found that the trial court did not err in impliedly rejecting the waiver argument. (*Ibid*.)

Likewise, here the facts only show that defendant participated in litigation for about three months before bringing its petition to compel arbitration, which is not enough to demonstrate a waiver. Some discovery has been exchanged, but plaintiff has not shown that any of the information obtained in discovery would not have been discoverable under AAA rules. Defendant has not brought any discovery motions or obtained orders on such motions. Similarly, the defendant's payment of jury fees and attendance at the case management conference was necessary to avoid a waiver of the right to a jury trial if the court denied the petition to compel arbitration, and shows "mere participation in litigation", not conduct inconsistent with arbitration.

Also, even assuming that defendant's conduct was inconsistent with seeking arbitration, plaintiff has failed to show that it was misled, affected or prejudiced by the delay in defendant's request to arbitrate. (*Sobremonte v. Superior Court, supra*, 61 Cal.App.4th at 992.) "A party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." (*Fisher v. A.G. Becker Paribas Inc*. (9th Cir. 1986) 791 F.2d 691, 694.) Here, plaintiff has not demonstrated any prejudice from the defendant's delay or other conduct, so the court does not intend to find a waiver of the right to arbitrate.

Next, plaintiff argues that the court should find that the agreement is unenforceable because it is unconscionable. However, plaintiff has failed to show that the agreement is both procedurally and substantively unconscionable.

"Unconscionability has both procedural and substantive elements. Although both must appear for a court to invalidate a contract or one of its individual terms, they need not be present in the same degree: '[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'" (*Serpa v. California Surety Investigations, Inc*. (2013) 215 Cal.App.4th 695, 702-703, internal citations omitted.)

"Procedural unconscionability focuses on the elements of oppression and surprise. 'Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice.... Surprise involves the extent to which the terms of the bargain are hidden in a "prolix printed form" drafted by a party in a superior bargaining position.'" (*Id*. at 703, internal citations omitted.)

"Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they create an 'overly harsh' or '"one-sided" result', that is, whether contractual provisions reallocate risks in an objectively unreasonable or unexpected manner. Substantive unconscionability 'may take various forms,' but typically is found in the employment context when the arbitration agreement is 'one-

sided' in favor of the employer without sufficient justification, for example, when 'the employee's claims against the employer, but not the employer's claims against the employee, are subject to arbitration.'" (*Ibid*, internal citations omitted.)

"'Substantive unconscionability' focuses on the terms of the agreement and whether those terms are 'so one-sided as to "shock the conscience."'" (*Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1330, internal citations omitted.)

Here, plaintiff argues that the agreement is procedurally unconscionable because defendant failed to provide a copy of the AAA rules incorporated into the agreement at the time plaintiff signed it, and it was presented to plaintiff on a "take it or leave it" basis. However, she does not present any evidence that the agreement was a contract of adhesion, or that she was not given a chance to negotiate its terms. She states in her declaration that she does not even remember signing the agreement. (Mejorado decl., ¶ 3.) She also does not remember Brown or Manley explaining the agreement to her. (*Id*. at ¶ 4.) Also, she does not remember having a choice not to sign the agreement. (*Id*. at ¶ 6.) Thus, the plaintiff's evidence only shows that she does not remember anything about signing or reading the agreement, and does not establish that it was presented to her on a "take it or leave it" basis.

In any event, even assuming that the agreement was presented on a "take it or leave it" basis, contracts of adhesion in employment cases are not necessarily so procedurally unconscionable as to warrant refusing to enforce them. (*Roman, supra*, 172 Cal.App.4th at 1471.) Where the agreement is not buried in a lengthy document, and is clearly and succinctly labeled, the procedural unconscionability of an adhesive arbitration clause is limited. (*Ibid*.) Also, procedural unconscionability is not enough, by itself, to make the agreement unenforceable without some measure of substantive unconscionability. (*Ibid*.)

Here, the agreement was not buried in a lengthy document, and was submitted as a separate, clearly labeled, and succinctly worded two-page agreement. (Exhibit B to Petition.) In addition, as discussed further below, the plaintiff has not shown any substantive unconscionability, so the limited amount of procedural unconscionability resulting from the adhesive nature of the agreement is not enough, by itself, to warrant refusing to enforce it.

In addition, to the extent that plaintiff argues that the agreement was procedurally unconscionable because she was not given a copy of the AAA rules with the agreement, she has failed to show that this alleged defect made the agreement unconscionable.

"Agreements which incorporate the rules of a third-party organization without providing the employee with those rules at the time of signing can be procedurally unconscionable if the employee is not provided a copy of the rules upon signing the agreement. However, in those cases, the decisions seem to be based on the additional fact that the rules were not fair to the weaker party." (*Lucas v. Gund, Inc.* (C.D. Cal. 2006) 450 F.Supp.2d 1125, 1131, internal citations omitted.)

In *Lucas*, the federal court found that the failure to give plaintiff a copy of the AAA rules at the time she signed the agreement was not enough to show substantive unconscionability, because the AAA rules did not limit the remedies available to her, and there were no unfair provisions in the arbitration agreement that conflicted with the AAA rules. (*Ibid*.)

Likewise, here plaintiff has not demonstrated that the failure to provide her with the AAA rules resulted in any surprise to her, or caused her to give up any substantial rights. She has not shown that the AAA rules limit her available remedies, or that there were other provisions of the arbitration clause that were inconsistent with the AAA rules in such a way that it resulted in a loss of her rights. It appears that plaintiff's rights are in fact adequately protected under the agreement, since she still has the right to discovery, as well as the full remedies available under FEHA and other applicable law. (Exhibit B to Petition, p. 7-5.) Therefore, plaintiff has not shown that the failure to give her a copy of the AAA rules at the time she signed the agreement rendered the agreement unconscionable.

Next, with regard to substantive unconscionability, plaintiff argues that the agreement is unconscionable because defendant has treated the agreement as if it does not apply to it. Plaintiff alleges that defendant has "stalled" in consenting to arbitration in another case, and that defendant has refused to consent to allow the AAA to administer the case even though the agreement provides for the arbitration to follow AAA rules.

However, it is irrelevant whether defendant has consented to arbitration in a different case. The real issue is whether the agreement itself applies equally to both parties, not whether defendant has been slow to consent to arbitration in another case. The agreement's language clearly requires both parties to arbitrate any disputes arising out of the plaintiff's employment, so it is not one-sided on its face. In any event, defense counsel claims that any delay in consenting to arbitration in the other case was the result of the process of retaining counsel and obtaining the insurance company's consent to arbitration, not because the agreement itself is one-sided.

Also, to the extent that plaintiff argues that the defendant is refusing to allow the AAA to take jurisdiction over the case, this does not show substantive unconscionability. The agreement only provides that arbitration will be conducted under AAA rules, not that the AAA must be the organization that conducts the arbitration. (Exhibit B, p. 7-5.) Nor has plaintiff shown that defendant is refusing to apply the AAA rules to the case. While plaintiff claims that defendant is acting as if there are no rules, or that it can pick and choose which rules to follow, there is no evidentiary support for this claim. Instead, it appears that defendant is willing to apply AAA rules, but does not necessarily want to have the AAA administer the claim. Thus, plaintiff has not shown substantive unconscionability based on the defendant's alleged refusal to submit the matter to the AAA for arbitration.

Plaintiff has also argued that her rights are limited under the agreement, because the AAA rules provide one procedure for choosing arbitrators, but the

agreement provides for a different procedure. Again, however, plaintiff has failed to show that this difference in the procedure for choosing an arbitrator has resulted in any unfairness to her. Regardless of whether the parties use the AAA rules or the arbitration procedure to choose the arbitrator, the parties will still have a neutral arbitrator hear the case, and plaintiff will have a say in picking the arbitrator. Therefore, plaintiff has failed to show that the agreement contains any substantive unconscionability. Consequently, the court intends to grant the petition to compel arbitration, and stay the pending action until the arbitration proceedings have been resolved.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 12/10/2013.
(Judge's initials) (Date)